Siti Athirah bt Mohd Sapuan v Razanatul Ain bt Hassan & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-04–228–08 OF 2014
MOHD HISHAMUDIN, LINTON ALBERT AND TENGKU MAIMUN JJCA
22 JUNE 2015

Tort — Negligence — Contributory negligence — Road accident — Motorcyclist sued car driver and owner for negligence — Car driver did not testify nor offer evidence — Whether trial court's inference was wrong — Whether car driver's police report not part of evidence — Whether car driver wholly liable for accident — Whether contributory negligence not tort of negligence contributing to own injury

Damages (Personal Injury or Death) — Personal injuries — Whether trial court failed to follow trend of awards for fracture of right tibia and fibula with 5cm shortening whether failed to separately award damages for skin grafting — Whether RM80,000 reasonable and fair award for the fractures and shortening — Whether justification not shown for RM45,000 awarded — Whether RM25,000 reasonable sum for skin grafting — Whether RM80,000 awarded by trial court for to rectify leg shortening reasonable

The appellant sued the respondents in the sessions court for negligence arising out of a road accident. The appellant's version was that she was riding a motorcycle along a road when a car driven by the first respondent, and owned by the second respondent, coming from the opposite direction without forewarning cut across her path to turn into a junction on her left. The appellant could not avoid the car and a collision took place. She suffered several injuries the most severe of which were fractures to her right leg which required five surgeries since the accident. The respondents pleaded contributory negligence on the appellant's part but they did not appear at the trial nor adduce evidence in support of their case. The sessions court held the appellant and the first respondent were equally liable for the accident inferring from the first respondent's police report and photographs showing damage to the car, that the appellant must have been speeding at the material time. The trial court awarded the appellant RM45,000 for open fracture of the right tibia and fibula with 5cm shortening and RM80,000 to meet the cost of future operations. The appellant appealed to the High Court against the finding that she was contributorily negligent; against the inadequacy of the award for the fractures and shortening; and against the trial court's failure to award separate damages

for skin grafting that she had to undergo. The respondents, on the other hand, appealed against the award for future operations. The High Court dismissed both the appeal and the respondents' cross-appeal. It agreed with the trial court that the appellant was speeding at the material time based on the first respondent's police report and the photographs tendered in evidence. The instant appeal by both parties was against the respective decisions of the High Court.

Held, allowing the appeal, dismissing the respondent's cross-appeal.

(1) The trial court only had the appellant's evidence on the events leading up to the collision. Since the first respondent did not testify at the trial, her police report was never tendered in evidence. A court was only bound to consider evidence that was properly tendered before it and admitted as evidence. Anything else should be disregarded. Both the sessions court and the High Court should have ignored the first respondent's police report when deliberating on the finding of liability. The High Court erred in assuming that just because the police report formed part of the respondents' documents it was admissible evidence which the sessions court could consider in arriving at its judgment (see paras 18, 21).

(2) The appellant was not liable for contributory negligence. Except for her evidence that she was riding her motorcycle at 50km per hour at the material time, there was no evidence to show she was speeding or that she had exceeded the prescribed speed limit. The investigating officer was never cross-examined on the speed limit on the stretch of road where the accident occurred. It was wrong of the trial court to infer the appellant was speeding merely based on the extent of damage to the car as seen in the photographs (see paras 19, 25, 26).

(3) The trial court's approach to finding liability and contributory negligence was wrong. Instead of immediately scrutinising the appellant's conduct, the sessions court should have found out whether the first respondent had breached her legal duty of care towards the appellant and only if negligence had been established should the court then have proceeded to determine whether the appellant was contributorily negligent. Liability should not have been 'apportioned' between the parties as this gave the erroneous impression that the appellant and the first respondent were co-tortfeasors. The first respondent was the only tortfeasor and was 100% liable for the accident. Contributory negligence was not the tort of negligence and if the appellant was 50% liable for contributory negligence, it did not mean the first respondent's liability for the tort of negligence was reduced to 50%; it still remained at 100%, only that the damages awarded to the appellant would be reduced by 50% (see paras 27, 28, 42).

(4) The sum awarded by the trial court for the fractures and shortening was manifestly low and did not follow the current trend of cases in awarding damages. Nowhere in the trial court's judgment was it justified how the sum of RM45,000 was arrived at. A sum of RM80,000 was a more reasonable and fair amount taking into account the severity of the injuries and inflation due to the passage of time (see paras 33, 34).

(5) The appellant was awarded RM25,000 as damages for skin grafting based on photographs of the skin grafting done on her and the current trend of the courts to grant a separate award for that head of damages (see para 37).

(6) Having considered the evidence of the appellant's and the respondent's experts, the court found it was very likely the appellant, in view of her young age and the shortening in her leg, would require further operations to remedy her disability. Accordingly, the respondents' cross-appeal against the trial court's award for future operations was dismissed (see para 40).

[Bahasa Malaysia summary

Perayu telah menyaman responden dalam mahkamah sesyen kerana kecuaian yang timbul akibat daripada kemalangan jalan raya. Versi perayu adalah bahawa dia sedang membawa motorsikal sepanjang suatu jalan apabila kereta yang dipandu oleh responden pertama, dan dimiliki oleh responden kedua, yang datang dari arah bertentangan tanpa amaran memotong ke dalam laluannya untuk membuat lencongan masuk ke jalan susur di sebelah kirinya. Perayu tidak dapat mengelak kereta itu dan satu pelanggaran telah berlaku. Dia mengalami beberapa kecederaan di mana yang paling serius adalah tulang patah pada kaki kanannya yang memerlukan lima pembedahan sejak kemalangan itu. Responden membuat pli untuk kecuaian sumbangan di pihak perayu tetapi mereka tidak hadir semasa perbicaraan atau pun mengemukakan apa-apa keterangan sokongan untuk kes mereka. Mahkamah sesyen memutuskan perayu dan responden pertama sama-sama bertanggungjawab untuk kemalangan itu berdasarkan laporan polis responden pertama dan gambar-gambar foto yang menunjukkan kerosakan pada kereta itu, bahawa perayu mungkin memandu dengan laju pada masa tersebut. Mahkamah perbicaraan telah mengawardkan perayu RM45,000 untuk patah terbuka pada tibia dan fibula kanan dengan pemendekan 5 sm dan RM80,000 sebagai kos untuk pembedahan masa depan. Perayu telah merayu kepada Mahkamah Tinggi terhadap penemuan bahawa dia telah menyumbang kepada kecuaian itu; terhadap award yang tidak mencukupi untuk tulang yang patah dan pemendekan itu; dan terhadap kegagalan mahkamah perbicaraan mengawardkan ganti rugi khas untuk cantuman kulit yang dia perlu dilakukan ke atasnya. Mahkamah Tinggi telah menolak kedua-dua rayuan dan rayuan balas responden. Ia bersetuju dengan mahkamah perbicaraan bahawa perayu sedang memandu laju pada masa material berdasarkan laporan polis responden

pertama dan gambar-gambar foto yang dikemukakan sebagai keterangan. Rayuan oleh kedua-dua pihak adalah terhadap keputusan berkaitan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan, menolak rayuan balas responden.

(1) Mahkamah perbicaraan hanya mempunyai keterangan perayu tentang kejadian yang membawa kepada kemalangan itu. Oleh kerana responden pertama tidak memberi keterangan semasa perbicaraan, laporan polisnya tidak dikemukakan dalam keterangan. Mahkamah hanya terikat untuk mempertimbangkan keterangan yang telah dikemukakan sewajarnya di hadapannya dan diterima sebagai keterangan. Apa-apa yang lain tidak patut diambil kira. Kedua-dua mahkamah sesyen dan Mahkamah Tinggi patut tidak mengendahkan laporan polis responden pertama semasa membuat keputusan tentang penemuan liabiliti. Mahkamah Tinggi terkhilaf dalam mengandaikan hanya kerana laporan polis membentuk sebahagian daripada dokumen-dokumen responden ia adalah keterangan yang boleh diterima di mana mahkamah sesyen boleh mengambil kira dalam membuat penghakimannya (lihat perenggan 18, 21).

(2) Perayu tidak bertanggungjawab kerana kecuaian penyumbang. Kecuali keterangannya bahawa dia sedang membawa motorsikal pada 50km sejam pada masa matan, tiada keterangan untuk menunjukkan dia memandu laju atau bahawa dia melebihi had laju yang ditetapkan. Pegawai penyiasat tidak pernah diperiksa balas berhubung had laju pada sepanjang jalan di mana kemalangan itu berlaku. Adalah salah untuk mahkamah perbicaraan membuat andaian perayu memandu laju dengan hanya berdasarkan takat kerosakan kereta yang dilihat dalam gambar-gambar foto (lihat perenggan 19, 25, 26).

(3) Pendekatan mahkamah perbicaraan untuk membuat penemuan liabiliti dan kecuaian penyumbang adalah salah. Daripada dengan segera meneliti kelakuan perayu, mahkamah sesyen sepatutnya mendapati sama ada responden pertama telah melanggar kewajipan berjaga-jaganya yang sah terhadap perayu dan hanya jika kecuaian telah dibuktikan maka mahkamah patut seterusnya menentukan sama ada perayu menyumbang kepada kecuaian. Liabiliti itu tidak patut 'dibahagikan' antara pihak-pihak kerana ia memberikan anggapan yang salah bahawa perayu dan responden pertama adalah pelaku-pelaku tort bersama. Responden pertama sahaja adalah pelaku tort dan bertanggungjawab 100% untuk kemalangan itu. Kecuaian penyumbang bukan kecuaian tort dan jika perayu bertanggungjawab 50% kerana kecuaian penyumbang, ia tidak bermaksud liability responden pertama untuk tort kecuaian dikurangkan kepada 50%; ia masih kekal 100%, hanya ganti rugi yang diawardkan

kepada perayu akan dikurangkan kepada 50% (lihat perenggan 27, 28, 42).

(4) Jumlah yang diawardkan oleh mahkamah perbicaraan untuk tulang patah dan pemendekan amat rendah dan tidak mengikut tren semasa untuk kes-kes yang diawardkan ganti rugi. Tiada mana-mana dalam penghakiman mahkamah perbicaraan ia adalah wajar untuk menunjukkan bagaimana jumlah RM45,000 diputuskan. Sejumlah RM80,000 adalah lebih munasabah dan jumlah yang adil dengan mengambil kira keseriusan kecederaan dan kadar inflasi disebabkan oleh peredaran masa (lihat perenggan 33, 34).

(5) Perayu telah diawardkan RM25,000 sebagai ganti rugi untuk cantuman kulit berdasarkan gambar-gambar foto cantuman kulit yang dilakukan ke atasnya dan tren semasa mahkamah untuk memberikan award berasingan bagi jenis ganti rugi tersebut (lihat perenggan 37).

(6) Setelah mengambil kira keterangan pakar-pakar perayu dan responden, mahkamah mendapati ia tidak berkemungkinan perayu, berdasarkan umurnya yang masih muda dan pemendekan pada kakinya, memerlukan pembedahan selanjutnya untuk memulihkan ketidakupayaannya. Sewajarnya, rayuan balas responden terhadap award mahkamah perbicaraan untuk pembedahan masa depan adalah ditolak (lihat perenggan 40).]

Notes

For cases on contributory negligence, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1140–1208.

For cases on trend of awards, see 6 *Mallal's Digest* (4th Ed, 2014 Reissue) para 1002.

Cases referred to

Abdul Malek b Long v Wan Muhammad b Wan Abdullah & Anor [2007] 1 PIR 15, SC (refd)

Chuah Ah Chee & Ors v Gurdial Singh & Anor 351 of 1979, HC (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)

Kek Kee Leng v Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61, FC (refd)

Lee Hock Lai v Yeoh Wah Pein [1999] 5 MLJ 172, HC (refd)

Musa b Jusoh v Mazlan b Bidin & Anor [2009] 1 PIR 8, SC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor, FC [2009] 6 MLJ 751, FC (folld)

Zulkifli b Rashid & Anor v Sivasubaramaniam a/l Varathan & Anor, sc [2012] 2 PIR 48, SC (refd)

Legislation referred to

Civil Law Act 1956 s 12
Evidence Act 1950 ss 32, 60

Appeal from: Civil Appeal No 12B-138–03 of 2013 (High Court, Shah Alam)

Harjeet Singh (PS Sohanpal & Sidhu) for the appellant.
Farah Nina bte Zainal Abidin (Dass, Jainab & Assoc) for the respondents.

Mohd Hishamudin JCA:

INTRODUCTION

[1] The appeal before us emanates from the High Court of Shah Alam, namely, Shah Alam High Court Civil Appeal No 12B–138–03 of 2013.

[2] The appeal is by the plaintiff (the appellant before us) against the decision of the learned High Court judge dated 15 April 2014 dismissing the plaintiff's appeal against the decision of the learned sessions court judge dated 27 February 2013.

[3] There is also before us a cross-appeal by the defendants (the respondents before us) against the dismissal of its cross-appeal by the High Court.

[4] The plaintiff's claim in the sessions court against the defendants was for negligence arising from a road accident. The plaintiff was the rider of a motorcycle and is suing the first defendant, the driver of a car that had collided with her motorcycle. The second defendant is the owner of the car and is sued for vicarious liability for the negligence committed by the first defendant.

[5] The defendants pleaded contributory negligence on the part of the plaintiff.

DECISION OF THE SESSIONS COURT

[6] At the sessions court, the defendants were not present at the trial. Although their counsel was present, they did not adduce any evidence. At the end of the trial, the learned sessions court judge found the defendants liable for the accident and 'apportioned 50% liability' to the defendants. The learned judge also made a finding of liability against the plaintiff and 'apportioned' the 'remaining 50% liability' to the plaintiff.

[7] On the issue of quantum of damages, the learned sessions court judge awarded damages amounting to RM 45,000 to the plaintiff for open fracture of

A the right tibia and fibula with shortening, and RM80,000 to the plaintiff as costs for future operations, among others.

[8] Dissatisfied, the plaintiff filed an appeal to the High Court against the decision of the sessions court, whilst the defendants cross-appealed against the same. The plaintiff's appeal to the High Court was against the finding of liability as well as on the quantum of damages awarded by the sessions court. On the issue of liability, learned counsel for the plaintiff argued that the learned sessions court judge erred in finding the plaintiff liable for contributory negligence. Instead, it was argued, the first defendant was wholly to be blamed for the accident.

[9] On the issue of quantum of damages, it was argued by the learned counsel for the plaintiff that the learned sessions court judge had erred in her decision when she failed to make an award for damages for skin grafting. The learned counsel also raised issue on the manifestly low award of RM 45,000 for fracture of the right tibia and fibula with shortening.

[10] The defendants' cross-appeal in the High Court was against the decision of the sessions court in making an award for cost of future operations. The defendants contended that the plaintiff would not be requiring any further operations, as such the sessions court should not have granted damages for cost of future operations.

F DECISION OF THE HIGH COURT

[11] The High Court dismissed both the plaintiff's appeal and the defendants' cross-appeal.

G

[12] Hence, this appeal before us.

DECISION OF THIS COURT

H **[13]** On 12 February 2015, we allowed the plaintiff's appeal with costs against the decision of the High Court and dismissed the defendants' cross-appeal. The decision of the High Court was accordingly set aside; and the decision of the sessions court was varied.

I **[14]** Our decision was unanimous.

THE GROUNDS FOR OUR DECISION

[15] We now give our grounds for allowing the appeal.

[16] We will begin by setting out briefly the facts of the case.

The facts of the case

[17] The plaintiff was twenty years old at the time of the accident. The accident occurred on 20 April 2010. According to the plaintiff (PW2), on that fateful day, she was riding her motorcycle along Jalan Klang—Banting, Selangor, when suddenly, a car from the opposite direction, driven by the first defendant, without any signal, turned into her path. The first defendant's car was heading for a junction that was on the plaintiff's left. The plaintiff was unable to avoid the first defendant's car. The car collided into the plaintiff's motorcycle. As a result of the accident, the plaintiff suffered extensive injuries, the most severe of which was on her right leg. Since the accident, the plaintiff had to undergo at least five surgeries on her right leg.

On liability

[18] As has been mentioned earlier, the first defendant was not present in court at the trial to offer evidence on how the collision occurred. As such, we only have the plaintiff's evidence on the events leading up to the collision. The investigating officer of the case (PW1) tendered as evidence, the sketch plan (exh P1) as well as photographs of the scene and of the vehicles involved in the accident (exhibit P2 A—D).

[19] At the end of the trial, the learned sessions court judge made an inference, based on the first defendant's police report and the photographs tendered, that the plaintiff was speeding at the material time. The relevant part of the learned sessions court judge's grounds of judgment is reproduced below (at p 3):

> Di dalam kes ini mahkamah melihat kepada laporan polis defendan di ms 2 di Bundle B yang menyatakan bahawa belum sempat kereta itu membelok ke kanan, tiba-tiba sebuah motorsikal datang dari arah bertentangan melanggar bahagian hadapan kanan. Maka di sini terdapatnya dua keterangan yang berbeza tentang bagaimana keadaan kemalangan berlaku. Walaupun defendan tidak hadir memberi mahkamah, mahkamah tetap meneliti laporan polis yang telah dikemukakan oleh pihak defendan. Mahkamah bersetuju dengan penghujahan daripada peguam defendan dengan melihat pada gambar di mana gambar kenderaan defendan adalah teruk pada bahagian kanan. Apabila melihat pada keadaan ini, apa yang boleh mahkamah andaikan bahawa motorsikal plaintif adalah dipandu dalam keadaan laju. Defendan juga perlu mempunyai tugas yang lebih berhati-hati untuk memasuki simpang. Dalam perkara ini mahkamah bersetuju untuk membahagikan

liabiliti yang sama rata ke atas plaintif dan defendan. Sepertimana yang telah diputuskan di dalam kes *Hussein & Anor v Maiden* [1970] 1 MLJ 114 Federal Court yang menyatakan seperti berikut: *equal apportionment of liability between cyclist on minor road and motorist on main road as motorist on main road owes duty to be on lookout for other road users crossing minor road.*

Berdasarkan alasan-alasan tersebut mahkamah memutuskan untuk liabiliti sebanyak 50% plaintif dan 50% defendan.

[20] The learned High Court judge was in complete agreement with the learned sessions court judge that the plaintiff was speeding at the material time. This, the learned High Court judge held, was based on the police report of the first defendant and the photographs.

[21] We have had the opportunity to scrutinise all the documentary evidence adduced at the trial court, and with due respect, we are unable to agree with the learned sessions court judge that the plaintiff was liable for contributory negligence. There are two reasons for this. The first is that, the learned High Court judge, with due respect, fell into error when accepting the learned sessions court judge's finding that the plaintiff was speeding at the material time. The learned sessions court judge arrived at this finding based on the first defendant's police report, a document that was never tendered as evidence in court. We hardly need to stress here that a court is only bound to consider evidence that has been properly tendered before it and admitted as evidence. Anything else should be completely disregarded by the court. In the present case, the fact remains that since the first defendant did not attend court to testify, her police report was never tendered as evidence before the sessions court. As such, both the learned sessions court and High Court judges should have ignored the first defendant's police report completely when deliberating on the finding of liability. We find that, with due respect, the learned High Court judge erred in law in assuming that just because the first defendant's police report formed part of the plaintiff's documents, therefore, the police report was admissible evidence in court, and which evidence the sessions court judge could consider in arriving at her judgment. In this regard, we find that it is necessary to reproduce the relevant portion of the learned High Court judge's judgment (as found at p 5 of the judgment):

[10] Clear from the above judgment, based on the police report which was part of the plaintiff's own documents and the damages to the vehicles, the learned sessions judge found as a fact that the plaintiff was speeding at that time. This contributes to the accident. It was held by the Supreme Court in *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403 'negligent as used in the expression 'contributory negligence' does not mean breach of duty. It means the failure by the person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. The test of contributory negligent is based entirely on the conduct of the plaintiff in the particular accident or case.'

[22] On the failure of the first defendant to testify, we wish to associate ourselves with the Federal Court decision of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 where Gopal Sri Ram, FCJ (as he then was) said (at p 761 of the judgment):

> [6] In the present instance, there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. This, the trial judge clearly omitted to do. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point as this certainly amounts to a misdirection which has occasioned a miscarriage of justice.

[23] On the admissibility of the first defendant's police report, we wish to refer to the dictum of the High Court in the unreported case of *Chuah Ah Chee & Ors v Gurdial Singh & Anor* (Civil Suit No 351 of 1979, High Court, Penang) which was subsequently cited with approval by the Supreme Court in *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 (at p 713 of the judgment):

> However, the effect in law of this report, bearing in mind that it was a self-serving statement made by a person who was not called at the trial, was that it was worthless as evidence being nothing more than hearsay. None of the exceptions to the hearsay rule embodied in s 32 of the Evidence Act 1950 applied. It makes no difference that it was included in an agreed bundle of documents, because this was done merely to dispense with proof of its making, thus obviating the necessity of having to call the recording officer. In other words, its contents were never admitted; were it otherwise, liability would never have been in issue. In this context, counsel for the plaintiffs rightly pointed out that at the time of the inclusion of the report in the agreed bundle, the defendant driver was still alive and so, it was intended to be used only either to corroborate or to contradict his version but never as a substitute for oral evidence from the witness box (see s 60 of the Evidence Act 1950).

[24] The second reason why we find the decision of the High Court flawed is because the learned High Court judge found the plaintiff liable for contributory negligence, based on the allegation that the plaintiff was speeding. We are, with due respect, unable to accept that the plaintiff should be faulted for her misfortune. We have scrutinised the evidence before the sessions court, but we are unable to find an iota of evidence to point to the fact that she was speeding at the material time when the accident occurred.

[25] In this regard, we agree with learned counsel for the plaintiff that the learned sessions court judge should not have made a finding that the plaintiff

was speeding in the absence of any evidence to that effect. We find that, except for the evidence of the plaintiff herself that she was riding her motorcycle at 50km per hour on the fateful day when the collision took place, there was no evidence at all to the effect that the plaintiff was speeding, or had exceeded the prescribed speed limit for the stretch of road in question. The investigating officer (PW1) was never cross-examined on the speed limit of the stretch of road where the accident occurred. With due respect, we disagree with the learned sessions court judge's finding of speeding on the part of the plaintiff merely based on the extent of the damage to the first defendant's car as seen in the photographs. That being the case, the learned sessions court judge erred when she made an inference that the plaintiff was speeding, or that the plaintiff had contributed to the accident and thus liable for contributory negligence.

[26] For the above reasons, we find that the plaintiff was not liable for contributory negligence and that both the learned judges of the lower courts had erred when they ruled to the contrary.

[27] At this juncture, we also wish to note with dismay the approach adopted by the learned sessions court judge in establishing liability and contributory negligence against the plaintiff. The learned sessions court judge seemed to have directed her mind to a completely wrong approach when making a finding of liability and contributory negligence. Instead of asking herself whether the first defendant was liable for the tort of negligence, it is clear from her grounds of judgment that she straight away proceeded to scrutinise the conduct of the plaintiff. The present case, being a claim for the tort of negligence, the appropriate approach should have been for the learned sessions court judge, first and foremost, to make a finding of mixed fact and law whether or not the first defendant had breached her legal duty of care towards the plaintiff. Only once negligence had been established against the first defendant should the learned sessions court judge then proceed to determine contributory negligence on the part of the plaintiff, if any (since contributory negligence is pleaded): whether the plaintiff's actions were such that the plaintiff had contributed to the injury or damage that she suffered. In this regard, we wish to refer to the High Court case of *Lee Hock Lai v Yeoh Wah Pein* [1999] 5 MLJ 172 where the reasoning process was explained (at p 175 of the judgment):

> With respect, the learned sessions court judge was fundamentally wrong in her approach. The case she was dealing with – a normal road accident case essentially concerns the tort of negligence. The proper manner of approaching the case, as with all cases of similar nature, was for the court to evaluate the whole evidence and to make a finding of mixed law and fact (after applying the principles governing the law of negligence to the facts of the case – among which was whether there was a breach of a legal duty to take care by the defendant) as to whether or not the defendant was liable in negligence. If the court were to find that the defendant was not guilty of negligence, then it must dismiss the plaintiff's claim. And in view of

the fact that in the present case there was no counterclaim by the defendant against the plaintiff for negligence, that would be the end of the matter! But, if on the other hand, she were to come to a finding that the defendant was liable in negligence, then since in the present case the defendant, in his pleading, had pleaded contributory negligence, she must also consider and make a finding of mixed law and fact (after applying the principles governing contributory negligence to the facts of the case) whether or not the plaintiff was guilty of contributory negligence. And assuming that she were to find the plaintiff guilty of contributory negligence, then the damages recoverable by the plaintiff are to be reduced to such an extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.

[28] Now, considering the manner the grounds of judgment of the learned sessions court judge was written, we are impelled to add here that the learned sessions court judge should not have 'apportioned' liability between the parties, and should not use such expression as 'liabililti sebanyak 50% plaintif dan defendan 50%' if what she had meant was that the plaintiff was only guilty of contributory negligence and that, therefore, the award should, accordingly, be reduced by 50%. For, the expression used by the learned sessions court judge gives the erroneous impression that both the plaintiff and the first defendant were co-tortfeasors and each equally guilty (50:50) of the tort of negligence; whereas in truth there was only one tortfeasor who was guilty of the tort of negligence: the first defendant, who was wholly liable (that is to say, 100%) for the accident. The plaintiff was only the victim and could only be — if at all — liable for contributory negligence. Contributory negligence is not the tort of negligence. One must not get confused between liability for the tort of negligence and liability for contributory negligence. Assuming for the moment that the learned sessions court judge were to find the plaintiff liable for contributory negligence, then she must reduce the damages awarded by the court accordingly, say, 10% or 20% or 30%, as the case may be, in accordance with her assessment as to the extent of the contribution on the part of the plaintiff pertaining to the injury or damages that she had suffered. And assuming that the sessions court were to find the plaintiff liable for contributory negligence and that the award must be reduced accordingly, say, by 50%, it does not follow that first defendant's liability for the tort of negligence must consequently be reduced to 50%. The first defendant's liability for the tort of negligence still remains 100%. (But in the instant case we have found the plaintiff not at all liable for contributory negligence.)

[29] For a better understanding of contributory negligence, it is instructive to refer to (a) s 12 of the Civil Law Act 1956 and (b) the decision of the Federal Court in the case of *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61. Section 12 of the Civil Law Act provides:

Apportionment of liability in case of contributory negligence

12(1) Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility of the damage:

Provided that-

(a) this subsection shall not operate to defeat any defence arising under a contract; and

(b) where any contract or written law providing for the limitation of liability is applicable to the claim the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the minimum limit so applicable.

(2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

...

(6) In this section 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

[30] In *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* the Federal Court held (at p 63 of the judgment):

Contributory negligence is an expression meaning 'negligence materially contributing to the injury' (see Lord Porter in *Caswell v Powell Duffryn Associated Collieries*), the word 'contributory' being regarded 'as expressing something which is a direct cause of the accident' (see judgment of Lord Maugham in *R v Southern Canada Power Co*). However the word 'negligence' is not used in its usual meaning. Negligence ordinarily means breach of a legal duty to take care, but as used in the expression 'contributory negligence' it does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. More recently, Lord Simon in giving the judgment of the Privy Council in *Nance v Columbia Electric Ry* said at p 611:

When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

In short, the question in this case depends entirely on whether the plaintiff could reasonably have avoided the consequences of the second defendant's negligence having regard to the specific findings of the learned judge.

On quantum of damages

Fracture of the right tibia and fibula with 5 cm shortening

[31] On quantum, the first issue raised by learned counsel for the plaintiff before us, is that, the award of damages of RM 45,000 for the fracture of the right tibia and fibula with 5cm shortening, was extremely low and disproportionate to the injuries suffered by the plaintiff, taking into account the fact that she had to undergo five surgeries after the accident. It was thus submitted by learned counsel that based on the dearth of case law on this area of injury, a figure of RM80,000 as damages, would be a more reasonable and proportionate amount.

[32] The learned High Court judge found the amount awarded by the learned sessions court judge was not manifestly low to justify judicial intervention, and dismissed the plaintiff's appeal on this issue.

[33] With due respect, we are unable to agree with the learned High Court judge. On the contrary, we agree with learned counsel for the plaintiff that the amount of damages awarded by the trial court was manifestly low. We find that nowhere in the learned sessions court judge's grounds of judgment did she justify how she arrived at the sum of RM45,000 for the above injury. We also find that the learned sessions court judge failed to follow the current trend of cases in awarding damages. We wish to refer to the trend of cases on this heading of injury, including *Abdul Malek b Long v Wan Muhammad b Wan Abdullah & Anor* [2007] 1 PIR 15 where the trial court awarded damages of RM65,000 for closed fracture of the left tibia plateau and neck of fibula, with 1.5 cm shortening of the leg, and *Zulkifli b Rashid & Anor v Sivasubaramaniam a/l Varathan & Anor, sc* [2012] 2 PIR 48 in which the sessions court awarded RM50,000 for fracture of the right tibia and fibula with 2cm shortening of the right leg.

[34] In the present case, the CT Scanogram conducted by the medical specialists found that the plaintiff had between 4 and 5cm shortening of her right leg. We, therefore, set aside the award of RM45,000 ordered by the sessions court for fracture of the right tibia and fibula with shortening, and substitute it with an award of RM80,000. We do not find the amount given by the sessions court as reasonable, and think that RM80,000 is a more reasonable and fair amount to reflect the severity of the injuries suffered by the plaintiff, as well as taking into account inflation due to the passage of time. Abdul Malek

bin Long was decided in 2007 whilst the present case was decided by the sessions court in 2013.

Skin grafting

[35] Learned counsel for the plaintiff also raised an issue on the failure of the sessions court judge to award damages for skin grafting done on the plaintiff. It was argued by learned counsel that a separate award should be made for this injury, and that the learned sessions judge had erred in her judgment when she did not consider an award for skin grafting. Before us, learned counsel for the defendants did not seriously address this issue of a separate award for skin grafting. The learned High Court judge held that since the sessions court had made a global award for all the injuries suffered by the plaintiff (including RM 8,000 for scarring), therefore there was no necessity to make a separate award for skin grafting.

[36] In this regard, learned counsel for the plaintiff drew our attention to the case of *Musa b Jusoh v Mazlan b Bidin & Anor* [2009] 1 PIR 8, a sessions court decision where the court made separate awards for fracture, scarring and skin grafting, namely RM20,000 for skin grafting and another RM30,000 for scarring. Relying on the above authority, learned counsel for the plaintiff urged us to consider a separate award for skin grafting and proposed that RM25,000 would be a reasonable figure for skin grafting.

[37] Upon perusing the evidence before us, including photographs on the skin grafting performed on the plaintiff, and the current trend of the courts to grant a separate award for skin grafting, we make an award of RM25,000 as damages to the plaintiff for skin grafting. We find that a separate award for skin grafting ought to have been made by the learned sessions court judge, and disagree, with due respect, with the learned High Court judge that the global award made was adequate. We note the extent of skin grafting done on the plaintiff, and find that it is only reasonable that an award of damages be made under this heading.

On the cross-appeal

[38] We now turn to the defendants' cross-appeal. The defendants' cross-appeal is against the decision of the High Court in dismissing its appeal there for cost of future operations, wherein the sessions court had awarded the plaintiff RM80,000. Learned counsel for the defendants submitted that the learned sessions court judge should not have awarded any damages under this heading. This, learned counsel contended, was based on the expert opinion of Dr Kuldip Singh a/l Swaran Singh (DW1), who testified that the plaintiff would not require any further operations for her injuries, and the medical

report prepared by DW1 (exh D8), which concluded the same.

[39] The plaintiff's expert witness, Dr Suntharalingam a/l Subramaniam (PW4), testified that due to the shortening of the plaintiff's right leg, the plaintiff would require further operations for the lengthening of her leg, and suggested that the operations would cost RM80,000. PW4 strongly recommended future operations for the plaintiff, taking into account her young age and her disability to walk properly.

[40] We have considered both the experts' evidence and we find that the plaintiff would indeed require further operations. In this regard, we prefer to associate ourselves with the opinion of PW4, who opined that due to the permanent shortening of the leg suffered by the plaintiff, she would require further operations. DW1 in his report too had admitted that the plaintiff has permanent shortening of the leg. We take note that due to this disability, coupled with the plaintiff's young age, it is very likely that the plaintiff would require further operations. We thus dismissed the defendants' cross–appeal.

CONCLUSION

[41] Therefore, for the reasons stated above, we allowed the plaintiff's appeal, and dismissed the defendants' cross–appeal with costs of RM15,000 for here and below.

[42] The order of the sessions court to the effect that the liabilities of the parties are:

(a) plaintiff– 50%; and

(b) defendants– 50%,

is varied. Since we find the defendants wholly (100%) liable in negligence towards the plaintiff, and that there is no contributory negligence on the part of the plaintiff, accordingly, we vary the sessions court order with an order that the defendants be held 100% liable towards the plaintiff for the accident, with no liability for contributory negligence on the part of the plaintiff in respect of the injury or damages that she had suffered.

[43] On quantum, the order of the sessions court is now varied in that the award for the fracture of the right tibia and fibula with shortening is now increased to RM80,000. There is also a separate award for skin grafting in the sum of RM25,000.

[44] We affirm the rest of the award of the sessions court.

A **[45]** Appeal is allowed with costs, cross–appeal is dismissed with costs, order of the sessions court varied accordingly.

Appeal allowed with costs, respondent's cross-appeal dismissed.

B Reported by Ashok Kumar

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